SUPREME COURT, U. S.

JUL 31 1974

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1959

WILLIAM ROSS ADEY, *Petitioner*,

v.

UNITED ACTION FOR ANIMALS, INC., ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should disturb the findings of the two courts below that petitioner, the plaintiff in a libel action, is a public figure.

2. Whether the constitutional protection afforded by this Court's decisions in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and its progeny applies to a publication disseminated by a humane organiza-

tion to 2,500 subscribers and 500 libraries, where (a) the publication exhorted its readers to write their Congressmen and Senators in an effort to terminate appropriations of public money for research involving animal experimentation, (b) the plaintiff in a libel action predicated on the publication had vastly superior access to the news media and was invited to testify on the subject of the publication before a congressional committee, and (c) the plaintiff admitted that he never sought access to the humane organization's mailing list to distribute a reply.

STATEMENT

On June 28, 1969 a fourteen-pound pigtail macaque nicknamed "Bonny" was propelled into earth orbit by a group of scientists working with the National Aeronautics and Space Administration (NASA). The flight, which was part of a series of animal space experiments, received widespread newspaper and media publicity and involved the expenditure of $92 million in tax money.

The petitioner, an internationally famous research neurologist, supervised the experiment for NASA. (Tr. 199-200) [1] He spent six weeks living at Cape Kennedy preparing the monkey for flight, and assisted over the course of many months in the design of the miniature space capsule. (Tr. 198-209)

Bonny's flight was designed to last thirty days and to test the effect of prolonged weightlessness upon the monkey's sleep patterns and certain physiological functions. After eight days in space, Bonny's physical condition suddenly deteriorated and he was brought back to earth where he died a few hours after recovery.

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[1] Citations to "(Tr. —)" are to the transcript of the trial.

Immediately after Bonny's death, petitioner called a press conference and announced that he was utterly at a loss to explain the monkey's rapid decline and demise. (J.A. 72-73) [2]

The Bonny trip immediately became the subject of considerable controversy. The experiment was criticized, not only by various organizations in the animal welfare movement (J.A. 155, 212), but also by the news media (J.A. 70-71); by Col. John Powers, long famous as the voice of Mission Control on manned space flights (J.A. 157); by NASA's Deputy Director for Medical Research (J.A. 163); and by staff doctors at the Manned Space Flight Center in Houston. (J.A. 162)

Much of the criticism embodied the view that the animal was so heavily instrumented and subject to such severe stress from the unnatural environment that any findings from the experiment were without significant medical value. This criticism was even expressed by one of petitioner's colleagues in the Bonny experiment. (J.A. 186-89)

As a result of the controversy, petitioner was called to testify before the congressional subcommittee which oversees NASA projects. (J.A. 150-51) He attempted to answer the widespread public criticism of the Bonny experiment and to salvage appropriations for future animal experiments. [3]

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[2] Citations to "(J.A. —)" are to the Joint Appendix in the Court of Appeals.

[3] See *Hearings Before the Subcommittee on Space Science & Applications of the House Committee on Science & Astronauts*, 91st Cong., 1st Sess. 71-102 (1969) [hereinafter cited as *House Hearings*].

Shortly after the Bonny flight respondent United Action for Animals (UAA) published a fourteen-page report strongly critical of the experiment. (J.A. 7-20). The report was prepared by respondents Eleanor Seiling and MacDonald White, president and vice president respectively of UAA. It was disseminated through the UAA's mailing list to the organization's roughly 2,500 members and to approximately 500 other humane societies and libraries. The report was accompanied by a "Call to Action" which exhorted readers to write their Senators and Congressmen urging a cut-off of appropriations for such animal space experiments in the future. (J.A. 21-22)

After a description of the Bonny experiment, the accuracy of which has never been challenged, the report argued that the experiment was cruel to the animal, noting that the jungle-bred monkey was strapped to a couch and virtually immobilized within a tiny space capsule, with many measuring devices attached to and implanted in its body, including numerous electrodes in its brain, a catheter in its heart, another in its bladder and four tubes (two in each leg) leading from its thighs along the femoral arteries to the heart. The report also suggested that the experiment was inadequately controlled to permit the gathering of reliable data, pointing to published scientific criticism of the heavy instrumentation and unnatural circumstances in which the monkey was placed. The report also suggested that the experimenters should have attempted to proceed by alternative methods, including computer modeling. Finally, it attacked the expenditure of $92 million in tax money for the experiment.

The report named petitioner as the superintendent of the experiment and contained a number of state-

ments critical of his role. The central focus for the bulk of the testimony at the trial was the report's accusation that petitioner "has a long history of abuse of animals." (J.A. 9)

Petitioner brought suit for libel in the United States District Court for the Southern District of New York. The respondents defended upon the grounds that the statements complained of were true and that they were in any event privileged both under the New York law of fair comment and the First Amendment privilege established by *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), and its progeny.

At trial it was demonstrated that the basic criticisms of the report echoed beliefs held by substantial segments of the scientific community. (J.A. 160-63, 183, 186-89, 212) With respect to the charge that he "has a long history of abuse of animals," petitioner admitted on cross-examination that between 1956 and 1969 he engaged in extensive animal experiments which involved, *inter alia*:

—the administration of LSD to cats and the observation of their "bizarre behavior," which included remaining in catatonic postures and shaking their heads "violently against unseen objects" (J.A. 119-20, 214-15);[4]

—the repeated administration of calcium chloride to cats under circumstances where petitioner was aware that epileptic seizures would probably be produced, which seizures sometimes resulted in generalized convulsions and death for the animals (J.A. 232-34);

—the removal of portions of the brains of 29 phalangers (small Austrialian marsupials) and

[4] In his article describing this experiment petitioner remarked that "cats under LSD are as much fun as human beings." (J.A. 214)

the subsequent administration of "painful and noxious stimuli," including pinching their tails and paws, prodding them with sticks and "roughly assaulting"[5] the animals with bundles of cloth in order to test the aggressiveness of their reactions (J.A. 215-25);[6]

—the centrifuging of cats and monkeys, involving the application of forces of up to ten to twelve times the force of gravity, with resultant loss of consciousness on the part of the animals (J.A. 258-60);

—the isolation of newborn monkeys in darkness and silence for a year (Defendants Exhibit 0).

Respondent Seiling testified that in preparing the UAA report she consulted not only press reports of the Bonny experiment and published lay and scientific criticism of the experiment (J.A. 66-78), but also an extensive collection of scientific articles dealing with animal experimentation, including specifically petitioner's own writings describing the experiments mentioned above and others (J.A. 55-56, 315-29). Respondents Seiling and White both testified that they believed all statements in the report to be true when they published it and that they continued to hold that belief. (J.A. 62, 94, 339)

Petitioner sought to rebut the charge that his experiments were cruel with testimony from his colleagues at the UCLA Brain Research Institute to the effect

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[5] The terms in quotation marks are petitioners's own words taken from his report of the experiment.

[6] Petitioner admitted that at least one of the phalangers in this experiment suffered repeated generalized convulsions after the portion of its brain had been removed. (J.A. 223) He described such convulsions as "one of the general problems of brain surgery." (J.A. 224) Of course, much of petitioner's work involves brain surgery on animals for experimental purposes.

that his animals were adequately cared for before and after his experiments and that he always took reasonable steps to minimize the pain and discomfort to which they were subjected by the experiments. However, these witnesses admitted that the experiments involved the knowing infliction of pain upon the animals (J.A. 102), and that the concept of cruelty "is a matter on which reasonable men may differ." (J.A. 308, 106-07) With respect to the administration of drugs under circumstances where the experimenter knows that convulsions are likely to be produced, one of petitioner's expert witnesses testified:

> where this is done, and done carefully and without undue pain . . . I do not consider it to be cruel, but I know many people do consider it to be cruel . . . .

(J.A. 107)

Petitioner himself admitted that someone with a point of view different from his own could call the phalanger experiment abusive. (J.A. 224-25)

Following the close of testimony, petitioner conceded that he was a public figure within the meaning of this Court's First Amendment libel decisions and that the experiment was a matter of public controversy. He argued, however, that the *New York Times* privilege was inapplicable because this was a "private" libel in light of the limited distribution of the report and petitioner lacked "sufficient access to the means of counter-argument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 155 (opinion of Harlan, J.). Alternatively, petitioner argued that he had satisfied the *New York Times* test for "actual malice" because the evidence showed the

publication was made with reckless disregard for the truth.

The Honorable Edward Weinfeld, sitting without a jury, found petitioner to be a public official (Pet. App. 9a) [7] and rejected his argument that the privilege was inapplicable because of the limited dissemination of the report and his purported lack of access to the "means of counterargument." The court noted in this regard petitioner's easy access to the news media and to a congressional forum and his admitted failure to request use of the UAA mailing list to disseminate a reply. (Pet. App. 7a-10a & n. 6)

Judge Weinfeld then found that petitioner had failed to demonstrate reckless disregard for the truth:

> The evidence does not establish with "convincing clarity" that the defendants entertained serious doubts as to the truth of their statements or that they had "a high degree of awareness of their probable falsity." To the contrary, they asserted their continuing belief that the statements in the UAA publications were true and the evidence supports a finding that it was a sincere and genuinely held view. This belief was not drawn out of thin air or a product of their imaginations or contrived as a defense to plaintiff's charge.
>
> * * *
>
> Finally, evidence was introduced which demonstrated that plaintiff's experiments were subject to criticisms, direct and indirect, from other observers, including professional contemporaries of plaintiff, who differed with him. The opinion the defendants had of the experiment and the methods used to instrument the monkey was one

[7] Citations to "(Pet. App. —)" are to the Appendix to the Petition for a Writ of Certiorari.

> on which reasonable persons, professional and lay, could have differing points of view. The above convicingly establishes that defendants' statements and conclusions were not wholly fabricated nor inherently improbable. In sum, the Court finds that while the publication used strong and robust terms, it was made in good faith.

(Pet. App. 13a, 15a-16a)

The Second Circuit affirmed Judge Weinfeld's ruling from the bench without opinion. (Pet. App. 1a)

REASONS TO DENY THE WRIT

1. This case presents no issue under this Court's recent ruling in *Gertz* v. *Robert Welch, Inc.,* 42 U.S.L.W. 5123 (U.S. June 25, 1974).

This Court for the first time in *Gertz* established a comprehensive conceptual framework for the analysis of libel problems in light of First Amendment values. It held that the *New York Times* privilege is applicable in libel actions brought by public officials and public figures, thus requiring such persons to demonstrate that the publications complained of were false and were made with actual knowledge of falsity or reckless disregard for the truth. Private individuals who through no action on their own part become involved in public controversy may recover on a lesser showing to be established by state law, though even in such cases liability may not be imposed without fault. The protection of First Amendment interests was further held to require certain restrictions upon the award of damages in libel suits by private individuals.

In an effort to state an issue under *Gertz,* petitioner has attempted to inject a wholly nonexistent ambiguity

into the nature of his concession in the trial court and the findings of Judge Weinfeld. The thrust of his argument is that the applicable law at the time of trial was stated in the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), which was rejected by the Court in *Gertz*. In light of *Rosenbloom*, petitioner now states, he was forced to concede in the trial court *either* that he was a public figure *or* that the matter was one of substantial public controversy. He then argues:

> in light of the fact that petitioner conceded no more than that he was *either* a public figure or involved in a matter of public interest, the district court's statement that Dr. Adey acknowledged he was one or the other cannot fairly be construed as a factual finding that Dr. Adey was a public figure.

(Petition at 6 n.5) (emphasis in original) Thus petitioner asks that the judgment be vacated and remanded for a finding on this issue.

The ambiguity on which petitioner predicates his entire argument in this Court simply did not exist, either in his concession or in Judge Weinfeld's findings. The opening sentence of petitioner's post-trial brief in the District Court reads: "The plaintiff has conceded that he is a 'public figure' as that term is contemplated in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967)." (Plantiff's Post-Trial Brief on Requested Points of Law at 1) This concession was not qualified or hedged about in any manner, as indeed it could not have been in view of the record.

Moreover, Judge Weinfeld did not predicate his ruling upon an ambiguous finding that the *Times*

privilege was applicable under *either Butts* (public figure) *or Rosenbloom* (public issue). He found instead that

> Dr. Adey, in view of his official status with NASA and his leadership in the preparation of Bonny for the flight, clearly comes within the definition of a public official (as distinguished from a public figure).

(Pet. App. 9a) (footnote omitted).[8]

The remainder of petitioner's belated attempt to argue for "private" status is marred by other distortions of the record. For example, petitioner states:

> For all the record shows, petitioner's only role was in conducting the experiment prior to the launch of the monkey into space, rather than attempting "to engage the public's attention" to influence support of the experiment.

(Petition at 14)

With all due respect, the record shows considerably more than that. It is undisputed that petitioner was the spokesman of the experiment and that in this role he called a nationally reported press conference immediately following the monkey's death. (J.A. 72-73) Not only that, but in an effort to salvage congressional appropriations for animal space experiments at a time when they were under heavy attack, petitioner appeared

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[8] Judge Weinfeld also relied upon petitioner's concessions:

> The issues to be decided by the Court have been further narrowed by the acknowledgement that plaintiff was a public figure *and* that the flight was a matter of public interest.

(Pet. App. 5a-6a) (emphasis added). This is hardly an ambiguous *either-or* declaration which might be affected by this Court's decision in *Gertz*.

voluntarily before a Committee of the Congress and attempted precisely "to engage the public's attention to influence support of the experiment." (Tr. 229-30; see *House Hearings*)

Thus it is clear from the record that petitioner was not a hapless private individual sucked into the whirlpool of public controversy by events beyond his control. In this Court's language in *Gertz,* petitioner is one of those who "have thrust themselves into the forefront of particular public controversies in order to influence the resolution of the issues involved." 42 U.S.L.W. at 5130; see *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 155 (1967) (opinion of Harlan, J.); *Walker* v. *Pulitzer Publishing Co.,* 394 F.2d 820, 805 (8th Cir. 1968); *Pauling* v. *Globe-Democrat Publishing Co.,* 362 F.2d 188 (8th Cir. 1966).

Petitioner conceded in the trial court that he was a "public figure" as that term is contemplated in the *Butts* decision. Indeed, he could hardly have done otherwise in view of his prominence, not only in the scientific community, but in the public press as well. The decision in *Gertz* explicitly leaves standing the holding in *Butts* that public figures may not recover for libel absent a showing of reckless disregard for the truth.[9] The findings of the two courts below regarding petitioner's status are plainly supported by substantial evidence in the record, and there is no occasion for further review in this Court.[10]

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[9] We do not understand petitioner to attack in this Court the findings of both courts below that he failed to establish *New York Times* "malice."

[10] In light of his concession and of petitioner's obvious status as a public figure, it is unnecessary to consider whether, as respondents have contended throughout and as the trial court found, he was also a public official. As the man in charge for NASA of a $92 million public tax money venture, petitioned would seem

2. There is no issue of "private libel" involved in this case.

Petitioner seeks to argue in this Court that the *New York Times* privilege is somehow rendered inapplicable by the relatively limited dissemination of the UAA report. His arguments on this subject are internally inconsistent. First, he claims that there is a category of "private libel" in which the *New York Times* privilege is inapplicable because the publication was not part of a public controversy, relying upon *Grove* v. *Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971), which involved a confidential financial report. At the same time, petitioner argues that the *Times* rule should be inapplicable because he lacked "sufficient access to the means of counterargument" in the public debate, relying upon a dictum taken out of context from Mr. Justice Harlan's opinion in *Butts*. See 388 U.S. at 155. [11]

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clearly to meet the test of substantial responsibility for the conduct of public affairs. See *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966).

Moreover, as petitioner himself notes (Petition at 3), he has served prominently as a "consultant" to such government agencies as the National Institutes of Health, NASA, the Atomic Energy Commission, and the President's Science Advisory Committee. (Tr. 147-48) The record is silent on the nature of petitioner's duties in these consulting positions, or the extent of his remuneration, but it hardly lies in petitioner's mouth at this stage to minimize his status with these governmental agencies in an effort to attack a finding which he did not dispute at any point below. There is, in short, no record support whatever for petitioner's assertion that "he is not and has not been an official of any of these government agencies." (Petition at 3)

[11] Mr. Justice Harlan was not arguing that every imbalance in access to public media should result in a refusal to apply *New York Times*. Instead, he suggested that relative general access to the media was one factor among several which led him to conclude that public figures should be able to recover for libel upon showing something less than reckless disregard for the truth. That position, of course, was rejected in *Butts*, and that rejection was reaffirmed in *Gertz*.

The short answer to petitioner's argument is that he is wrong on both counts. The UAA report, despite its relatively limited dissemination, was very much part of a major public controversy. The report, while not distributed directly to the press, called upon its roughly 3,000 readers to undertake a letter-writing campaign to their congressmen to put an end to appropriations of public tax money for medical research experiments upon animals. To compare such a document to a privately distributed, confidential Dun & Bradstreet credit report is absurd.

Moreover, there is no support whatever in the record for petitioner's claim that he in fact lacked access to the "means of counterargument." As Judge Weinfeld found:

> The Bonny flight attracted so much publicity and aroused such controversy that there can be little doubt Dr. Adey readily could have commanded news media interest and availed himself of a public forum to answer the attack of the defendants. After Bonny's death the venture remained one of continuing public interest and controversy, including a congressional inquiry into such experiment, at which Dr. Adey appeared as a witness.

(Pet. App 9a)

Moreover, even if the UAA mailing list could be considered the relevant "medium" for counterargument, there is no showing that petitioner was denied access to it. Indeed, the record establishes the contrary:

> Q. Did you, Doctor, seek to go to Miss Seiling, UAA or MacDonald White and ask for a mailing list from them for a right of reply to the people that they had sent out their sheets to?
>
> A. No.

(J. A. 199)

Finally, Judge Weinfeld found:

> If these defendants, instead of distributing the publication to their own membership, urging them to write to Members of Congress, had advertised in a newspaper or broadcast an appeal to the public to do so, they would qualify for the constitutional protection. It would indeed be a strange and anomolous doctrine to deprive them of that protection because they limited the "Call to Action" to fellow members interested in animal welfare instead of broadcasting it to the general public.

(Pet. App. 10a)

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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